

R590. Insurance, Administration.

R590-230. Suitability in Annuity Transactions.

R590-230-1. Authority.

This rule is promulgated pursuant to Section 31A-22-425 wherein the commissioner is to make rules to establish standards for recommendations and Subsection 31A-2-201(3)(a) wherein the commissioner may make rules to implement the provisions of Title 31A.

R590-230-2. Purpose.

(1) The purpose of this rule is to:

(a) set forth standards and procedures for recommendations to consumers that result in a transaction involving annuity products so that the insurance needs and financial objectives of consumers at the time of the transaction are appropriately addressed; and

(b) require insurers to establish a system to supervise recommendations.

(2) Nothing herein shall be construed to create or imply a private cause of action for a violation of this rule.

R590-230-3. Scope.

(1) This rule shall apply to any recommendation to purchase, replace, or exchange an annuity made to a consumer by a[~~an~~ insurance] producer, or an insurer where no producer is involved, that results in the recommended purchase or exchange.

(2) Unless otherwise specifically included, this rule shall not apply to recommendations involving:

(a) direct response solicitations where there is no recommendation based on information collected from the consumer pursuant to this rule; and

(b) contracts used to fund:

(i) an employee pension or welfare benefit plan that is covered by the Employee Retirement and Income Security Act (ERISA);

(ii) a plan described by Internal Revenue Code (IRC) Sections 401(a), 401(k), 403(b), 408(k) or 408(p), as amended, if established or maintained by an employer;

(iii) a government or church plan defined in IRC Section 414, a government or church welfare benefit plan, or a deferred compensation plan of a state or local government or tax exempt organization under IRC Section 457;

(iv) a nonqualified deferred compensation arrangement established or maintained by an employer or plan sponsor;

(v) settlements of or assumptions of liabilities associated with personal injury litigation or any dispute or claim resolution process; or

(vi) formal prepaid funeral contracts.

R590-230-4. Definitions.

In addition to the definitions in Section 31A-1-301, the following definitions shall apply for the purpose of this rule:

(1) "Annuity" means:

(a) an annuity as defined in Section 31A-1-301; and
(b) a fixed annuity or variable annuity that is individually solicited, whether the product is classified as an individual or group annuity.

(2) "FINRA" means the Financial Industry Regulatory Authority or its successor.

(3) "Producer" includes an individual producer or agency producer.

(4) "Recommendation" means advice provided by a[n-insurance] producer, or an insurer where no producer is involved, to an individual consumer that results in a purchase, replacement or exchange of an annuity in accordance with that advice.

(5) "Replacement" is as defined in R590-93-3.

(6) "Suitability information" means information that is reasonably appropriate to determine the suitability of a recommendation, including the following:

(a) age;

(b) annual income;

(c) financial situation and needs, including the financial resources used for the funding of the annuity;

(d) financial experience;

(e) financial objectives;

(f) intended use of the annuity;

(g) financial time horizon;

(h) existing assets, including investment and life insurance holdings;

(i) liquidity needs;

(j) liquid net worth;

(k) risk tolerance; and

(l) tax status.

R590-230-5. Duties of Insurers and of [Insurance] Producers.

~~[(1) In recommending to a consumer the purchase of an annuity or the exchange of an annuity that results in another insurance transaction or series of insurance transactions, the insurance producer, or the insurer where no producer is involved, shall have reasonable grounds for believing that the recommendation is suitable for the consumer on the basis of the facts disclosed by the consumer as to his or her investments and other insurance products and as to his or her financial situation and needs.~~

~~(2) Prior to the execution of a purchase or exchange of an annuity resulting from a recommendation, an insurance producer, or an insurer where no producer is involved, shall make reasonable efforts to obtain information concerning:~~

~~(a) the consumer's financial status;~~

~~(b) the consumer's tax status;~~

~~(c) the consumer's investment objectives; and~~

~~(d) such other information used or considered to be reasonable by the insurance producer, or the insurer where no producer is involved, in making recommendations to the consumer.~~

~~(3) (a) Except as provided under Subsection (3) (b), neither an insurance producer, nor an insurer where no producer is~~

~~involved, shall have any obligation to a consumer under Subsection (1) related to any recommendation if a consumer:~~

~~—— (i) refuses to provide relevant information requested by the insurer or insurance producer;~~

~~—— (ii) decides to enter into an insurance transaction that is not based on a recommendation of the insurer or insurance producer; or~~

~~—— (iii) fails to provide complete or accurate information.~~

~~—— (b) An insurer or insurance producer's recommendation subject to Subsection (3) (a) shall be reasonable under all the circumstances actually known to the insurer or insurance producer at the time of the recommendation.~~

~~—— (4) (a) An insurer either shall assure that a system to supervise recommendations that is reasonably designed to achieve compliance with this rule is established and maintained by complying with Subsections (4) (c) to (4) (e) or shall establish and maintain such a system, including:~~

~~—— (i) maintaining written procedures; and~~

~~—— (ii) conducting periodic reviews of its records that are reasonably designed to assist in detecting and preventing violations of this rule.~~

~~—— (b) A general agent and independent agency either shall adopt a system established by an insurer to supervise recommendations of its insurance producers that is reasonably designed to achieve compliance with this rule, or shall establish and maintain such a system, including:~~

~~—— (i) maintaining written procedures; and~~

~~—— (ii) conducting periodic reviews of records that are reasonably designed to assist in detecting and preventing violations of this rule.~~

~~—— (c) An insurer may contract with a third party, including a general agent or independent agency, to establish and maintain a system of supervision as required by Subsection (4) (a) with respect to insurance producers under contract with or employed by the third party.~~

~~—— (d) An insurer shall make reasonable inquiry to assure that the third party contracting under Subsection (4) (c) is performing the functions required under Subsection (4) (a) and shall take such action as is reasonable under the circumstances to enforce the contractual obligation to perform the functions. An insurer may comply with its obligation to make reasonable inquiry by doing all of the following:~~

~~—— (i) the insurer annually obtains from a third party's senior manager, who has responsibility for the delegated functions, a certification that the manager has a reasonable basis to represent, and does represent, that the third party is performing the required functions; and~~

~~—— (ii) the insurer, based on reasonable selection criteria, periodically selects third parties contracting under Subsection (4) (c) for a review to determine whether the third parties are performing the required functions. The insurer shall perform those procedures to conduct the review that are reasonable under the circumstances.~~

~~_____ (e) An insurer that contracts with a third party pursuant to Subsection (4) (c) and that complies with the requirements to supervise in Subsection (4) (d) of this subsection shall have fulfilled its responsibilities under Subsection (4) (a).~~

~~_____ (f) An insurer, general agent or independent agency is not required by Subsection (4) (a) or (4) (b) to:~~

~~_____ (i) review, or provide for review of all insurance producer solicited transactions; or~~

~~_____ (ii) include in its system of supervision an insurance producer's recommendations to consumers of products other than the annuities offered by the insurer, general agent or independent agency.~~

~~_____ (g) A general agent or independent agency contracting with an insurer pursuant to Subsection (4) (c), shall promptly, when requested by the insurer pursuant to Subsection (4) (d), give a certification as described in Subsection (4) (d) or give a clear statement that the third party is unable to meet the certification criteria.~~

~~_____ (h) No person may provide a certification under Subsection (4) (d) (i) unless:~~

~~_____ (i) the person is a senior manager with responsibility for the delegated functions; and~~

~~_____ (ii) the person has a reasonable basis for making the certification.~~

~~_____ (5) Compliance with the National Association of Securities Dealers (NASD) Conduct Rules pertaining to suitability shall satisfy the requirements under this section for the recommendation of variable annuities. However, nothing in this subsection shall limit the commissioner's ability to enforce the provisions of this rule.]~~

(1) In recommending to a consumer the purchase of an annuity or the exchange of an annuity that results in another insurance transaction or series of insurance transactions, the producer, or the insurer where no producer is involved, shall have reasonable grounds for believing that the recommendation is suitable for the consumer on the basis of the facts disclosed by the consumer as to the consumer's investments and other insurance products and as to the consumer's financial situation and needs, including the consumer's suitability information, and that there is a reasonable basis to believe all of the following:

(a) the consumer has been reasonably informed of various features of the annuity, such as the potential surrender period and surrender charge, potential tax penalty if the consumer sells, exchanges, surrenders or annuitizes the annuity, mortality and expense fees, investment advisory fees, potential charges for and features of riders, limitations on interest returns, insurance and investment components and market risk. These requirements are intended to supplement and not replace the disclosure requirements of R590-229;

(b) the consumer would benefit from certain features of the annuity, such as tax-deferred growth, annuitization, or death or living benefit;

(c) the particular annuity as a whole, the underlying

subaccounts to which funds are allocated at the time of purchase, or exchange of the annuity, and riders and similar product enhancements, if any, are suitable, and in the case of an exchange or replacement that the transaction as a whole is suitable, for the particular consumer based on the consumer's suitability information; and

(d) in the case of an exchange or replacement of an annuity the exchange or replacement is suitable including taking into consideration whether:

(i) the consumer will incur a surrender charge, be subject to the commencement of a new surrender period, lose existing benefits, including death, living or other contractual benefits, or be subject to increased fees, investment advisory fee or charges for riders and similar product enhancements;

(ii) the consumer would benefit from product enhancements and improvements; and

(iii) the consumer has had another annuity exchange or replacement and, in particular, an exchange or replacement within the preceding 36 months.

(2) Prior to the execution of a purchase, replacement, or exchange of an annuity resulting from a recommendation, a producer, or an insurer where no producer is involved, shall make reasonable efforts to obtain the consumer's suitability information.

(3) Except as permitted under Subsection (4), an insurer shall not issue an annuity recommended to a consumer unless there is a reasonable basis to believe the annuity is suitable based on the consumer's suitability information.

(4) (a) Except as provided under Subsection (4) (b), neither a producer nor an insurer shall have any obligation to a consumer under Subsection (1) or (3) related to any annuity transaction if:

(i) no recommendation is made;

(ii) a recommendation was made and was later found to have been prepared based on materially inaccurate information provided by the consumer;

(iii) a consumer refuses to provide relevant suitability information and the annuity transaction is not recommended; or

(iv) a consumer decides to enter into an annuity transaction that is not based on a recommendation of the insurer or producer.

(b) An insurer's issuance of an annuity subject to Subsection (4) (a) shall be reasonable under all the circumstances actually known to the insurer at the time the annuity is issued.

(5) A producer or, where no producer is involved, the responsible insurer representative, shall at the time of sale:

(a) make a record of any recommendation subject to Subsection (1);

(b) obtain a customer signed statement documenting a customer's refusal to provide suitability information, if any; and

(c) obtain a customer signed statement acknowledging that an annuity transaction is not recommended if a customer decides to enter into an annuity transaction that is not based on the producer's or insurer's recommendation.

(6) (a) An insurer shall establish a supervision system that

is reasonably designed to achieve the insurer's and its producers' compliance with this rule, including the following:

(i) the insurer shall maintain reasonable procedures to inform its producers of the requirements of this rule and shall incorporate the requirements of this rule into relevant producer training manuals;

(ii) the insurer shall establish standards for producer product training and shall maintain reasonable procedures to require its producers to comply with the requirements of Section R590-230-6;

(iii) the insurer shall provide product specific training and training materials that explain all material features of its annuity products to its producers;

(iv) the insurer shall maintain procedures for review of each recommendation prior to issuance of an annuity that are designed to ensure that there is a reasonable basis to determine that a recommendation is suitable. Such review procedures may apply a screening system for the purpose of identifying selected transactions for additional review and may be accomplished electronically or through other means including physical review. Such an electronic or other system may be designed to require additional review only of those transactions identified for additional review by the selection criteria;

(v) the insurer shall maintain reasonable procedures to detect recommendations that are not suitable. This may include confirmation of consumer suitability information, systematic customer surveys, interviews, confirmation letters and programs of internal monitoring. Nothing in this subsection prevents an insurer from complying with this subsection by applying sampling procedures, or by confirming suitability information after issuance or delivery of the annuity; and

(vi) the insurer shall annually provide a report to senior management, including to the senior manager responsible for audit functions, that details a review, with appropriate testing, reasonably designed to determine the effectiveness of the supervision system, the exceptions found, and corrective action taken or recommended, if any.

(b)(i) Nothing in this subsection restricts an insurer from contracting for performance of a function, including maintenance of procedures, required under Subsection (6)(a). An insurer is responsible for taking appropriate corrective action and may be subject to sanctions and penalties pursuant to Section R590-230-7 regardless of whether the insurer contracts for performance of a function and regardless of the insurer's compliance with Subsection (6)(b)(ii).

(ii) An insurer's supervision system under Subsection (6)(a) shall include supervision of contractual performance under this Subsection. This includes the following:

(A) monitoring and, as appropriate, conducting audits to assure that the contracted function is properly performed; and

(B) annually obtaining a certification from a senior manager, who has responsibility for the contracted functions that the manager has a reasonable basis to represent, and does

represent, that the function is properly performed.

(iii) An insurer is not required to include in its system of supervision a producer's recommendations to consumers of products other than the annuities offered by the insurer.

(7) A producer shall not dissuade, or attempt to dissuade, a consumer from:

(a) truthfully responding to an insurer's request for confirmation of suitability information;

(b) filing a complaint; or

(c) cooperating with the investigation of a complaint.

(8)(a) Sales made in compliance with FINRA requirements pertaining to suitability and supervision of annuity transactions shall satisfy the requirements under this rule. This subsection applies to FINRA broker-dealer sales of variable annuities and fixed annuities if the suitability and supervision is similar to those applied to variable annuity sales. However, nothing in this subsection shall limit the commissioner's ability to enforce, including investigate, the provisions of this rule.

(b) For Subsection(8)(a) to apply, an insurer shall:

(i) monitor the FINRA member broker-dealer using information collected in the normal course of an insurer's business; and

(ii) provide to the FINRA member broker-dealer information and reports that are reasonably appropriate to assist the FINRA member broker-dealer to maintain its supervision system.

R590-230-6. Producer Training.

A producer may not solicit the sale of an annuity product unless the producer has adequate knowledge of the product to recommend the annuity and the producer is in compliance with the insurer's standards for product training.

R590-230-7. Compliance Mitigation and Penalties[~~of Responsibility~~].

(1) An insurer is responsible for compliance with this rule. If a violation occurs, either because of the action or inaction of the insurer or its producer, the[The] commissioner may order:

(a) an insurer to take reasonably appropriate corrective action for any consumer harmed by the insurer's, or by its producer's, violation of this rule;

(b) [~~an insurance producer to take reasonably appropriate corrective action for any consumer harmed by the insurance producer's violation of this rule; and~~

~~(c)]a [general agency or independent agency that employs or contracts with an insurance] producer [to sell, or solicit the sale, of annuities to consumers,]to take reasonably appropriate corrective action for any consumer harmed by the [insurance] producer's violation of this rule; and~~

(c) appropriate penalties and sanctions.

(2) Any applicable penalty under 31A-2-308 for a violation of [~~Subsection R590-230-5.(1), (2), or (3)(b)]this rule may be reduced or eliminated if corrective action for the consumer was taken promptly after a violation was discovered or the violation was not part of a pattern or practice.~~

R590-230-[7]8. Records.

Insurers[, ~~general agents, independent agencies~~] and ~~insurance~~ producers shall maintain or be able to make available to the commissioner records of the information collected from the consumer and other information used in making the recommendations that were the basis for insurance transactions for the current calendar year plus three years after the insurance transaction is completed by the insurer. An insurer is permitted, but shall not be required, to maintain documentation on behalf of a[n ~~insurance~~] producer.

R590-230-[8]9. Enforcement Date.

The commissioner will begin enforcing the provisions of this rule [45]60 days from the rule's effective date.

R590-230-[9]10. Severability.

If any provision of this rule or the application of it to any person or circumstance is for any reason held to be invalid, the remainder of the rule and the application of the provision to other persons or circumstances shall not be affected by it.

KEY: insurance, annuity suitability

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